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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/757,175	01/14/2004	Thomas M. Walraven	LTTKP0116US	4188

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Cleveland, OH 44115

EXAMINER

FRANCIS, FAYE

ART UNIT	PAPER NUMBER
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3728

DATE MAILED: 11/04/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/757,175

Applicant(s)

WALRAVEN, THOMAS M.

Examiner

Faye Francis

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 23 September 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 and 3-25 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 5-10, 12-15, 19 and 23-25 is/are allowed.
- 6) ☒ Claim(s) 1, 3, 4, 11, 16-18 and 20-22 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 14 January 2004 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

1. The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the a Xylophone in claim 20 must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

Corrected drawing sheets are required in reply to the Office action to avoid **abandonment** of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. The replacement sheet(s) should be labeled "Replacement Sheet" in the page header (as per 37 CFR 1.84(c)) so as not to obstruct any portion of the drawing figures. If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

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(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 1, 3-4, 11, 18 and 21-22 are finally rejected under 35

U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as

obvious over Eppe alone or in view of Eubanks.

Eppe discloses in Figs 1-12, a tunable turkey call on which the claimed toy percussion instrument and toy reads [the device is inherently capable of being struck]. It comprises an instrument body/main unit [rigid friction element 17], a striker/implement [striker rod element 26] for striking the instrument body to produce a sound having a rounded striker/implement portion, a striker attachment/ implement location [the striker weight element 27] and a handle end portion [Fig 12] and a tether [col 4 lines 20-21]. Additionally, Eppe discloses that the position of the striker weight element 27 can be adjusted anywhere on the rod 26 by moving the striker weight element up or down on the striker rod to obtain varying sounds.

The requirements for the striker attachment location being spaced inwardly from the ends of the striker by at least one fifth the length of the striker read on the device of Eppe as noted above because the device is inherently capable of being positioned inwardly from the ends of the striker by any desirable distance such as at least one fifth the length of the striker.

Should Eppe be later deemed not to meet claims 1, 3-4, 11, 18 and 21-22 because Eppe does not explicitly disclose that the tether has one end connected

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to the instrument body/main unit and at the opposite end connected to the striker/implement, Eubanks teaches that it is conventional to attach a striker to a body of a sounding instrument utilizing a tether. It would have been obvious to one of ordinary skill in the art at the time the invention was made, in view of Eubanks to attach the striker/implement in the device of Epple to its instrument body/main unit in order to prevent losing the striker/implement.

4. Claims 16-17 and 20 are finally rejected under 35 U.S.C. 103(a) as being unpatentable over Epple in view of Eubanks as applied to claims 1, 3-4, 11, 18 and 21-22 above and further in view of Luckenbach.

Modified device of Epple has most of the elements of these claims but for the instrument body/main having a shape of an animal such as a turtle.

Luckenbach is cited to show a desirability to provide a sounding toy in the shape of an animal. It would have been obvious to further modify the shape of the device of Epple to simulate an animal as taught by Luckenbach in order to make the toy more fun to play with. Additionally, it would have been obvious to make the device to look like a turtle in order to make the toy more fun to play with, for aesthetic reasons or as a matter of obvious design choice. The further modification of the shape of the instrument body/main in modified device of Epple to simulate a turtle would especially be obvious since the applicant discloses no advantage or critical need for the specific shape [see specification page 7].

Allowable Subject Matter

5. Claims 5-10, 12-15, 19 and 23-25 are allowed.

Response to Arguments

6. Applicant's arguments filed 9/23/04 have been fully considered but they are not persuasive.

In response to applicant's argument on page 9 that a xylophone, like a drum, is a well known percussion instrument that a detailed illustration thereof is not needed for a proper understanding of the invention, the examiner would like to point out that the drawings must show every feature of the invention specified in the claims. Therefor, the fact that the xylophone is a well-known percussion instrument is irrelevant.

In response to applicant's argument on top of the page 11 second paragraph that even if there were motivation to combine the teachings of Eubanks with those of Epple, the result would not give rise to the claimed subject matter. The examiner disagrees with the applicant's assertion, the modified device of Epple clearly has all that is claimed.

The examiner recognizes that references cannot be arbitrarily combined and that there must be some reason why one skilled in the art would be motivated to make the proposed combination of primary and secondary references. In re Nomiya, 184 USPQ 607 (CCPA 1975). However, there is no requirement that a motivation to make the modification be expressly articulated. The test for combining references is what the combination of disclosures taken as a whole would suggest to one of ordinary skill in the art. In re Simon, 174 USPQ 114 (CCPA 1972); In re McLaughlin, 170 USPQ 209 (CCPA 1971). References are evaluated by what they suggest to one versed in the art, rather

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than by their specific disclosures. In re Bozek, 163 USPQ 545 (CCPA 1969). In this case, the artisan would have been motivated in view of Eubanks to attach the striker/implement in the device of Epple to its instrument body/main unit in order to prevent losing the striker/implement.

In response to applicant's argument on page 11 that first, neither Epple nor Eubanks disclose a toy percussion instrument, the device of both Epple and Eubanks clearly disclose a toy percussion instrument ["An instrument, in which sound is produced by one object striking another" according to Merriam-Webster's Collegiate Dictionary Tenth Edition]. The applicant also argues that second, the manner of attachment of the tether to the striker is neither disclosed nor suggested by Epple and Eubanks, the examiner would like to point out that applicant never claims a manner [method] for attaching a tether to a striker. Prior art applied by the examiner in a rejection of claims is not required to show that which is not claimed.

Conclusion

7. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be

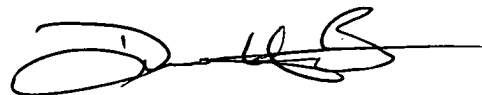
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calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Faye Francis whose telephone number is 703-306-5941. The examiner can normally be reached on M-F 6:30-3:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mickey Yu can be reached on 703-308-2672. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



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